(3)

No. 85-781

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, AND
RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE,
PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE U.S. HOUSE OF REPRESENTATIVES IN OPPOSITION

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Respondents, the Speaker and Bipartisan Leadership Group of the House of Representatives ("House parties")[1], submit this opposition to the petition for certiora-

[1] The House parties are the Honorable Thomas P. O'Neill, Speaker of the House of Representatives, and the Bipartisan Leadership Group of the House of Representatives—the Honorable Jim Wright, Majority Leader; the Honorable Robert H. Michel, Minority Leader; the Honorable Thomas S. Foley, Majority Whip; and the Honorable Trent Lott, Continued

ri. None of the three questions raised by the Executive Branch petitioners—the bounds of the pocket veto, standing, or mootness—merits review by this Court. Regarding the bounds of the pocket veto, the Pocket Veto Clause serves a serious purpose: to assure that the President is guaranteed ten days to decide between signing or vetoing a bill will not be "destroyed" or "cut down," [2] so that the President will not be "truly deprived," App. 29a (opinion of the Court of Appeals), of that guaranteed time. Supreme Court review of the issue should await an effort by Congress to deprive the President of that guaranteed time, which this case most certainly is not.[3]

Similarly, regarding standing, this Court may find Congressional standing worthy of review in an appropriate case, but this is not such a case. No party briefed or argued the issue of Congressional standing in either of the lower courts. In fact, at oral argument in the court of appeals, the Executive Branch petitioners supported standing here, agreeing with all the parties and all the judges except a lone panel judge who became interested *sua sponte* in his particular view. Executive Petitioners supported standing for good reason. Unlike the typical

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Minority Whip. The participation of the Speaker and Bipartisan Leadership Group is a normal mechanism for the House of Representatives to present its institutional position in litigation. *See* note 7, *infra*.

[2] *Edwards v. United States*, 286 U.S. 482, 486, 493 (1932).

[3] Judge McGowan's able opinion for the court of appeals largely consists of reaffirmation of the settled rule firmly established in the past, and sensibly followed by this Administration's predecessors, that the Clerk of the House can receive veto messages during Congressional adjournments much as the Executive Clerk and the Clerk of the Supreme Court receive bills and pleadings when the President or the Court are away. *See Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624 (Ct. Cl. 1964) (bill may be presented while the President is overseas), *cert. denied*, 380 U.S. 950 (1965); Sup. Ct. R. 44.5 (describing how a pleading "to the Court is received in vacation"); *compare* F.R.A.P. 45(a) (although a court of appeals may not be in session, it "shall be deemed always open for the purpose of filing any proper paper" with its Clerk) *with* H.R. Rule III(5) (House Clerk receives messages during adjournments).

Congressional standing case, here the Senate and House parties ("Houses") themselves intervened, to present the institutional interest rather than merely the interests of individual Members. Moreover, the interest involved does not concern execution of the law, but the interest of the Members and Houses of Congress in the lawmaking process itself. As discussed below, the petitioners' mootness question is just a variant of their standing question.

In sum, this is not a case in which the United States government presents a sound need for Supreme Court review. Rather, the Executive Branch of one Administration proffers an extreme theory regarding pocket vetoes which is out of line with the settled rule of the courts, prior Administrations, and Congress, and urges in addition a question of standing not briefed below which petitioners themselves correctly disavowed in the court of appeals. Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case omits key aspects of the proceedings which amply demonstrate the inappropriateness of Supreme Court review. Accordingly, the House parties provide a counterstatement.

1. On November 18, 1983, Congress presented the President with H.R. 4042, 98th Cong., 1st Sess., a bill concerning human rights certification for El Salvador, which had been passed by majority vote in both Houses, *See* App. 4a-5a and App. 141a-145a. Pursuant to the Pocket Veto Clause of the Constitution, art. I, § 7, cl. 2,[4] the President had ten days (Sundays excluded), or until November 30, 1983, to decide between two courses: to return veto the bill, that is, return the bill to the House of Representatives, the originating chamber, with his objections; or, to

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[4] In pertinent part, the clause provides:

> If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

let the bill become law with or without his signature. Since Congress had adjourned, the President would have returned a veto message to the Clerk of the House.[5] As discussed below, the settled rule has been that return of a bill with objections to the Clerk of the House satisfies the Pocket Veto Clause's requirements, much as presentation of a bill to the Executive Clerk satisfies the Clause's requirements for presentation to the President.

President Reagan chose not to return veto the bill. Instead, on November 30, 1983, the White House issued a statement withholding approval, *see* App. 5a, based on a novel belief that the President could simply disapprove without any return to the Congress, and thus deny Congress any opportunity to consider and override the objections by a two-thirds majority of each House. In light of that novel belief, petitioner declined to publish H.R. 4042 as a public law of the United States, *see* App. 6a.[6]

2. Plaintiff Members of Congress filed suit against petitioners in the United States District Court for the District of Columbia to vindicate plaintiffs' "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Baker v. Carr*, 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). The Executive Branch defended petitioners, and the Houses intervened in support of the plaintiff Members. *See* App. 3a n.3.[7] In district court, the Executive Branch chose consciously not to brief or argue any challenge to standing. On cross-motions for summary judgment, the District Court (Jackson, J.) ruled for the Executive defendants on the merits, the only issue presented, *see* App. 119a–132a, and the Members and Houses appealed.

[5] H.R. Rule III(5), *reprinted in* H. Doc. No. 277, 98th Cong., 2d Sess. § 647b (1985), provides: "The Clerk is authorized to receive messages from the President and from the Senate at any time that the House is not in session."

[6] The duty of publishing bills that have become law has been inherited by Petitioner Frank G. Burke, Archivist of the United States. Pub. L. No. 98–497, § 107(d), 98 Stat. 2291 (1984).

[7] The Speaker and Bipartisan Leadership Group serve as the regular mechanism for the House of Representatives to present its institutional position in constitutional litigation. *See, e.g., In re Benny*, 44 Bankr. 581 (N.D. Cal. 1984) (upholding statute defended by Speaker and Bipartisan Leadership Group); *appeal argued*, 84–2805, *et al.* (9th Cir. July 9, 1985); *In re Tom Carter Enterprises, Inc.*, 44 Bankr. 605

Continued

In the court of appeals (Robinson, C.J., and McGowan and Bork, JJ.), the Executive defendants again chose consciously not to brief or argue a challenge regarding standing. The Executive maintains in its Petition for Certiorari that it took that position because of "established circuit precedent." Petition for Certiorari at 5 n.2. The reality is otherwise. Assistant Attorney General Richard Willard made emphatically clear in his argument to the court of appeals that "[a]s the Executive Branch itself concedes, Congress clearly has standing to litigate the specific constitutional question presented." App. 15a, 17a (citing Tape Recording of Oral Argument at 204–11).

One judge, Judge Bork, became interested *sua sponte* in his particular view of standing, and not satisfied with Assistant Attorney General Willard's concurrence in the judgment of all the parties and all the other judges, insisted on pressing the issue, but the Executive did not change its position, yet. Rather, Assistant Attorney General Willard presented the reasons why the Executive had not contested standing:

(C.D. Cal. 1984) (same); *In re Moens*, No. 84–4109, *et seq.* (C.D. Ill. Feb. 21, 1985) (same), *appeal docketed*, No. 85–1499 (7th Cir. Mar. 27, 1985); *In re Moody*, 46 Bankr. 231 (M.D.N.C. 1985) (same), *transferred and notice of appeal filed*, No. 85–606 (S.D. Tex. Mar. 11, 1985); *In re Production Steel, Inc.*, 48 Bankr. 841 (M.D. Tenn. 1985) (same); *In re WHET, Inc.*, No. 84–2985–T (D. Mass.), *summarily aff'd*, No. 85–1119 (1st Cir. May 1, 1985) (dismissing challenge to statute, in appeal defended by Speaker and Bipartisan Leadership Group); *Ameron, Inc. v. U.S. Army Corps of Engineers*, Civ. No. 85–1064 (D.N.J. filed Mar. 27, 1985) (upholding statute defended by Speaker and Bipartisan Leadership Group), *appeal pending*, Nos. 85–5226, 85–5377 (3d Cir.); *Lear Siegler, Inc. v. Lehman*, No. CV 85–1125–KN (C.D. Cal. filed Nov. 21, 1985) (same); *Pitney Bowes, Inc. v. United States*, No. 85–0832 (D.D.C. filed Mar. 13, 1985) (resolving case without reaching issue of statute defended by Speaker and Bipartisan Leadership Group).

QUESTION: Why is there Article III standing here? Does the government take the position that there is Article III standing?

Mr. WILLARD: The government conceded in *Kennedy v. Sampson* that the Senate as a body would have had standing in that case, and since they have injected the standing in an individual Senator to raise a challenge, the Senate is alleging injury to its corporate interests, that is its interests as a body in being able to consider legislation after. . . . My point was simply that this case is different because we have the collective body that is the Senate as a Plaintiff here under statutory authority.

QUESTION: That doesn't make any difference—are you saying that doesn't make any difference under Article III standing?

Mr. WILLARD: We believe it does make a difference, that is for Article III purposes because the character of the injury collectively or separate by the Senate is different from that suffered by an individual. . . .

QUESTION: Doesn't the Senate as a body, when it intervenes, represent all citizens?

Mr. WILLARD: I don't believe they claim to do so.

QUESTION: What interests does the Senate as a body have other than the interest of seeing that constitutional government is properly maintained, which is really the interests of the citizens?

Mr. WILLARD: Well, it——

QUESTION: They do in their capacity, don't they?

Mr. WILLARD: I don't agree, Judge Bork. I don't think they claim to and I don't think they do. I think they sue in an institutional capacity as one-half of one of the three branches of government.

QUESTION: But does the institution have any interest to assert other than the interests of the citizens generally?

Mr. WILLARD: Yes, Judge Bork, I think it does. I think its interest is preserving what is an allocation of powers under the Constitution, just as the Executive has an interest in preserving its institutional——

QUESTION: You have a property right in the Senate as opposed to its representation of citizens, separating the interest of its powers form the interests of the electorate?

Mr. WILLARD: That is correct, Judge Bork.

3a. On June 4, 1984, the court of appeals ruled in favor of respondents, in a scholarly opinion by Judge McGowan. *See* App. 1a-46a. The opinion began with the facts and the prior proceedings, App. 1a-8a, and discussed, on the merits of the pocket veto, the views of the Framers and the key prior opinions on the pocket veto: *The Pocket Veto Case,* 279 U.S. 655 (1929); *Wright v. United States,* 302 U.S. 583 (1938); and *Kennedy v. Sampson,* 511 F.2d 430 (D.C. Cir. 1974). *See* App. 18a-33a. The court summed up in the two quotations from this Court which it emphasized. First, the Pocket Veto Clause's two fundamental purposes are to preserve the President's opportunity "to consider the bills presented to him," and Congress's opportunity "to consider [the President's] objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." App. 29a (quoting *Wright v. United States, supra,* 302 U.S. at 596). As Judge McGowan noted, "[t]he [Supreme] Court plainly stated: 'We should not adopt a construction which would frustrate either of these purposes.' " App. 29a (emphasis deleted) (quoting *Wright,* 302 U.S. at 596). Second, " '[t]he Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return,' " App. 27a (emphasis deleted) (quoting *Wright,* 302 U.S. at 589).

In rejecting petitioners' arguments, the court of appeals discussed how this Administration's position deviated from its predecessors:

> That intersession adjournments no longer present any real obstacle to the President's exercise of his qualified veto power was recognized by Presidents Ford and Carter, both of whom assumed the effectiveness of return vetoes made during such an adjournment.

App. 37a. Furthermore, the court of appeals identified the extreme nature of petitioners' claim:

> Conceding the absence of any practical difference between intrassession and intersession adjournments, *[Executive defendants] contend that the truly correct "bright line" must be drawn at the three-day mark.* Thus, if the tenth day after presentment falls during an adjournment of over three days, a bill that has not yet been returned expires by pocket veto. . . .

App. 42a (emphasis supplied).

3b. Judge Bork dissented at length, but addressed only the standing issue which he had raised *sua sponte* and which, he noted, had been conceded by petitioners. App. 49a n.1 (Bork, J., dissenting) ("The Executive Branch conceded at oral argument that the Senate has standing to sue in this suit. Similarly, in *Kennedy v. Sampson,* 511 F.2d 430, 435 (D.C. Cir. 1974), the Executive Branch conceded that either House of Congress would have standing to sue. . . ."). The panel opinion for the Court of Appeals responded to that limited dissent by discussing the firm basis of the standing of the Members and Houses, quoting *Coleman v. Miller,* 307 U.S. 433, 438 (1939) ("these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes"). App. 15a. Judge McGowan relied heavily on Justice Powell's trenchant concurrence in *Goldwater v. Carter,* 444 U.S. 996 (1979), regarding the justiciability of a case such as this.[8] Basically, the court of appeals accepted Assistant Attorney General Willard's position and argument, noting that:

[8] As the court of appeals noted, Justice Powell distinguished between the situation in *Goldwater,* in which " 'Congress has taken no official action. . . . [and] we do not know whether there ever will be an actual controversy between the Legislative and Executive Branches,' " and other cases such as this one, in which a dispute between Congress and the President should be resolved because " 'the political branches reach[ed] a constitutional impasse.' " App. 14a (quoting *Goldwater v. Carter,* 444 U.S. 996, 997-98 (1979) (Powell, J., concurring)).

> As the Executive Branch itself concedes, Congress clearly has standing to litigate the specific constitutional question presented. . . . While, as the dissent correctly observes, parties may not create jurisdiction by mere stipulation, an interpretation of Article III's "case or controversy" requirement by a coordinate branch of the federal government must not be wholly disregarded.

App. 17a & n.16 (citing Tape Recording of Oral Argument at 204-11.)

Only then, after petitioners lost on the merits, did they change position regarding standing. Petitioners say only that they changed position due to "further consideration," Petition for Certiorari at 5 n.2. Understandably, when petitioners argued the standing question for the first time, together with mootness, in requests for rehearing and rehearing en banc, the court of appeals did not find the newly-embraced arguments overwhelming.[9] In fact, of the ten judges considering rehearing en banc, only three even voted to set the matter for argument. *See* App. 135a-136a.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE COURT OF APPEALS REAFFIRMED A SETTLED AND SOUND RULE REGARDING THE POCKET VETO

1. Petitioners seek certiorari to challenge the settled rule that duly authorized Congressional officers can receive veto messages during adjournments. At the outset, this Court should note that there has been no division in the circuits regarding that rule. Both during and since Judge Tamm's opinion in *Kennedy v. Sampson, supra,* not one appellate judge—in the D.C. Circuit or elsewhere—has even questioned that rule. In fact, the Executive de-

[9] The House parties consistently refer in this opposition to petitioners' not having briefed the standing issue below. This is not to deny their having addressed it in their rehearing pleadings, but merely to distinguish pre-decision submissions from post-decision submissions.

fendants in *Kennedy v. Sampson,* acting at that time through Solicitor General Bork, did not even seek certiorari. Rather, Attorney General Levi announced that the Executive would follow the rule, the Justice Department settled another suit raising the matter, App. 37a n.32, and the rule took its place among issues of law settled and resolved.

2. That rule has been settled for good reason. The Pocket Veto Clause does not authorize pocket vetoes during all adjournments, but only when "the Congress, by their Adjournment, *prevent* [the bill's] Return." *U.S. Constitution,* art. I, § 7, cl. 2 (emphasis supplied). In 1929, this Court commented, in dictum, that "delivery of the [return vetoed] bill to some individual" would be "fictitious," *The Pocket Veto Case, supra,* 279 U.S. at 685, but that statement was purely hypothetical. Only in *Wright v. United States, supra,* was the matter presented concretely, and there the Court upheld return to an authorized officer as adequate. The Court overruled its 1929 expressions, agreeing with counsel for the House of Representatives that " '[t]he Houses of Congress have officers and agents of great power and responsibility who act in their stead, and who are constantly in their places when the Houses . . . are not in session.' " [10] There was " 'nothing in the Constitution which denies the right to the use of these agents in effecting the return of objected-to bills.' " *Id.,* 302 U.S. at 591.

Kennedy v. Sampson applied the *Wright* rule in confirming the adequacy of return to an authorized officer during adjournments. While that case concerned intrasession adjournments, since *Kennedy v. Sampson* the pocket veto has been reserved for use only during the final adjournments at the end of each two-year Congress. As petitioners conceded in District Court, there is no

[10] *Id.,* 302 U.S. at 591 (quoting the argument that had been presented in *The Pocket Veto Case* by Representative Hatton W. Sumners, on behalf of *amicus curiae* Committee on the Judiciary of the House of Representatives).

practical difference today between intrasession and intersession adjournments, App. 7a, 33a,[11] and accordingly, President Ford accepted return of messages to authorized officers as adequate during intra- and intersession adjournments. President Carter and, at first, even President Reagan continued to accept such returns during adjournments. App. 36a–37a nn.31–32.

3. Petitioners propose that during every adjournment of the Congress more than three days in duration the President should pocket veto rather than return veto.[12] Their

[11] Petitioners misleadingly comment about adjournments that are longer in duration than others, and intersession as opposed to intrasession adjournments, Petition for Certiorari at 23–26, when their actual position is that the President can pocket veto bills during all adjournments of the Congress, intersession or intrasession, longer than three days, *id.* at 27–28. In any event, Judge McGowan's opinion amply demonstrated the absence of any such distinction that could soundly be drawn, App. 29a–45a. At the time of *The Pocket Veto Case* in 1929, prior to the passage of the Twentieth Amendment in 1933, the intersession adjournment "divided two very different sessions of Congress, a 'long' session and a 'lame duck' session," App. 33a n.26. Thus, the intersession adjournment, a lengthy break between very different sessions, differed sharply from the mere intrasession adjournment, a short pause for Christmas and New Year's that did not separate anything very different. *See Kennedy v. Sampson, supra,* 511 F. 2d at 442–44 (listing pre-1933 intrasession adjournments).

In abolishing the regular "lame duck" session, the Twentieth Amendment abolished the difference between sessions that had marked previous intersession adjournments. Now, the intersession adjournment typically serves the function that had been served by the intrasession adjournment, as the break for Christmas and New Year's. The court of appeals recognized and petitioners concede, Petition for Certiorari at 23, that the duration of intersession adjournments has correspondingly diminished, as befits its current role.

[12] The Executive argued that the constitutional requirement that the two Houses agree on adjournments longer than three days creates a "bright line" somehow pertinent to the pocket veto. The court of appeals analyzed this thoroughly, and concluded that "[t]o choose a three-day line . . . simply because it is a line ignores the [Supreme] Court's mandate and the purpose of the pocket veto clause." App. 45a. Nevertheless, petitioners proffer that same theory to this Court, arguing for their "well-defined rule that the Pocket Veto Clause applies

Continued

proposal for a "three-day rule," App. 42a–43a, not only swings far out of line with the settled rule, the view of prior Administrations, and the bicameral and bipartisan position of the Congress, but also carries extreme implications in practice. For the President to pocket veto bills even over a three-day weekend would drastically upset the system of checks and balances. To illustrate, the House Calendar regularly collects in one section the "Bills Through Conference," which are the bills, numbering eighty-two in the 97th Congress, which were reported back from a conference committee. Typically, these are the most important and controversial bills presented to the President.

Pursuant to petitioners' theory of the three-day rule, of those eighty-two bills, sixty-one would have been subject to pocket veto.[13] In other words, petitioners would immunize seventy-four percent of the President's vetoes of such bills from override. Only twenty-one bills, or twenty-six percent, were subject to return veto under the proposed three-day rule.[14] As Judge McGowan noted, petitioners' theory of the three-day rule "deprives Congress of the final word on a significant portion of its legislation *and grants the President an absolute veto,*" App. 39a (emphasis supplied). When the Framers conferred on the President a qualified, but not absolute, veto which could be overridden by a two-thirds majority of both Houses of Congress, they made one of their most profound and enduring commitments regarding the system of checks and balances. The settled rule regarding the pocket veto preserves that system of checks and balances, which petitioners' extreme theory would disrupt.

when 'the Congress' has adjourned," Petition for Certiorari at 27–28, meaning any adjournment of both Houses, which includes all adjournments more than three days in duration.

[13] A table of these bills which was provided as an appendix to the brief for the House parties in the court of appeals is appended to this opposition.

[14] A factor not immediately apparent is that typically it takes several days after a final vote to prepare a bill for presentation to the President. The necessary preliminary to presentation—"enrollment," which makes certain that every word and punctuation mark in the bill matches what the Houses decided during the processes of floor and conference consideration—requires meticulous checking of the bill. Hence, if the pocket veto were available for all adjournments of the Congress, it would sweep up not only the bills voted on the eve of adjournment, but those voted considerably earlier but presented only within ten days of adjournment.

As described above, the Pocket Veto Clause serves a serious purpose: to assure that the President's guaranteed ten days to decide between signing or vetoing a bill will not be "destroyed" or "cut down." Supreme Court review of the issue should await an instance of deprivation of that guaranteed time. It should not be granted just to air again an extreme theory, far out of line with the settled rule, prior Administrations, and Congress, which was soundly rejected below.

II.

THIS IS NOT AN APPROPRIATE CASE TO REVIEW THE STANDING OR MOOTNESS ISSUES

Regarding respondents' standing, the court of appeals followed standards enunciated by this Court with which even the Executive Branch has hitherto agreed. The proceedings below show that even if this Court were inclined to review some Congressional standing case, this is not the appropriate one.

1. This Court has stated repeatedly that legislators have standing to protect their "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Baker v. Carr,* 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller,* 307 U.S. 433, 438 (1939)); *see also Dyer v. Blair,* 390 F. Supp. 1291, 1297 n.12 (N.D. Ill. 1975) (three-judge court) (Stevens, J.). The court of appeals simply followed those cases, which it discussed thoroughly and which the Petition for Certiorari omits to mention. Whatever separate issues arise when individual Members of Congress sue on their own because of the collegial nature of Congressional activity, in this case the Houses themselves in-

tervened in support of the Member plaintiffs. Even the Executive had hitherto agreed, in *Kennedy v. Sampson, supra,* that the Houses had standing in such a case, and the Executive's position in this case continued to concede that, until petitioners' late shift in position after the court of appeals ruled.

Petitioners do not argue that there is any division in the circuits, but seek review nonetheless by contending that the "doctrine of congressional standing [is] unique to the District of Columbia Circuit," Petition for Certiorari at 16–17. That contention is incorrect. Since the court of appeals follows *Baker v. Carr, supra,* and *Coleman v. Miller, supra,* naturally the other circuits follow the same rule, praising the D.C. Circuit for taking the Supreme Court's commands and "articulat[ing] a comprehensive jurisprudential theory defining the basis on which the courts should or should not dismiss suits filed by congressional plaintiffs against the executive branch." *Dennis v. Luis,* 741 F.2d 628, 632 (3d Cir. 1984).[15]

2. Even assuming *arguendo* that at some point this Court wishes to reconsider its pronouncements in *Baker v. Carr, supra,* and *Coleman v. Miller, supra,* this is not an appropriate case to review the issue of legislative standing. Petitioners failed to brief the issue below, and as described above, Assistant Attorney General Willard argued in favor of standing when questioned during argument in the court of appeals. Therefore, what petitioners proffer for review is an able opinion for the court of appeals which accepted petitioners' own undisputed arguments. An issue not briefed below, in which the parties

[15] For cases in other circuits following *Kennedy v. Sampson* or the D.C. Circuit's test generally, *see Dennis v. Luis, supra; Bordallo v. Camacho,* 520 F.2d 763, 764 (9th Cir. 1975); *Dellums v. Smith,* 573 F. Supp. 1489 (N.D. Cal. 1983); *McRae v. Mathews,* 421 F. Supp. 533, 540 (E.D.N.Y. 1976). Some cases arise from legislatures and courts in United States possessions such as the Virgin Islands, rather than from Congress and mainland district courts, but the courts of appeals deem this "a distinction without substance concerning the issue of standing." *Dennis v. Luis, supra,* 741 F.2d at 630 n.3.

challenging the opinion now are parties whose views were accepted below, has simply not matured sufficiently for review by this Court. This Court derives substantial benefits from opinions of courts below rendered on the basis of adversary presentations, and from receiving briefing and argument from counsel who have refined their position through such presentations. The House parties submit, and the jurisprudential needs of this Court require, that this Court not be deprived of the benefits of the normal evolutionary process by which sufficiently defined conflicts are presented for review simply because one party seeks, belatedly, to rely on the view of a lone dissenting judge.

Moreover, the fact that one lone dissenting judge below insisted on his particular view, generated *sua sponte* without briefing or adversary argument, against the judgment of all the parties and all his colleagues, hardly served to replace such adversary proceedings, for his view was so idiosyncratic that even the petitioners who selectively quote from it do not actually embrace it. Judge Bork's dissent disputes the validity of any "'governmental standing,'" that is, any occasion when "states or their legislators, executives, or judges" could sue "various branches of the federal government." App. 54a. As the court of appeals noted, this view would require overruling an overwhelming number of this Court's precedents,[16] and runs directly counter to Justice Powell's recent sound instruction that "a dispute between Congress and the

[16] App. 10a–11a (citing *INS v. Chadha,* 462 U.S. 919 (1983); *Nixon v. Administrator of General Services,* 433 U.S. 425, 439 (1977); *National League of Cities v. Usery,* 426 U.S. 833, 837, & n.7 (1976), *overruled on other grounds, Garcia v. San Antonio Metropolitan Transit Authority,* 105 S. Ct. 1005 (1985); *United States ex rel. Chapman v. FPC,* 345 U.S. 153, 154–56 (1953); *United States v. ICC,* 337 U.S. 426, 430 (1949); and *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803)). The list should also include *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966). In fact, even though the dissenting judge has had a short tenure, his particular view required him to disavow some opinions in which he himself participated already. *See* App. 54a n.2.

President *is* ready for judicial review when 'each branch has taken action asserting its constitutional authority'—when, in short, 'the political branches reach a constitutional impasse.'" App. 14a (emphasis in original) (quoting *Goldwater v. Carter,* 444 U.S. 996, 997 (1979)). It is not surprising that the Petition for Certiorari quotes the rhetorical devices appearing in the dissent rather than its basic position, but this only emphasizes that nothing written below addressed what petitioners would present in this Court.

Moreover, this case lacks the characteristics of typical Congressional standing cases. More often than not, such cases concern failure to execute the law, not, as here, the lawmaking process itself. Moreover, Members bring such cases individually, without intervention by the Houses.[17] In light of those two characteristics, motions to dismiss such cases on threshhold grounds usually succeed, and in any event are tested under doctrines not applicable in this case.[18] This case has none of these characteristics,

[17] For cases in the D.C. Circuit alone in which individual Members have sued, without intervention by the Houses to support them, *see, e.g., Goldwater v. Carter,* 444 U.S. 996 (1979); *Southern Christian Leadership Conference v. Kelley,* 747 F.2d 777 (D.C. Cir. 1984); *United Presbyterian Church v. Reagan,* 738 F.2d 1375 (D.C. Cir. 1984); *Moore v. U.S. House of Representatives,* 733 F.2d 946, *cert. denied,* 105 S. Ct. 779 (1985); *Crockett v. Reagan,* 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), *cert. denied,* 104 S. Ct. 3533 (1984); *Vander Jagt v. O'Neill,* 699 F.2d 1166 (D.C. Cir. 1982), *cert. denied,* 464 U.S. 823 (1983); *AFGE v. Pierce,* 697 F.2d 303, 305 (D.C. Cir. 1982); *Riegle v. Federal Open Market Committee,* 656 F.2d 873 (D.C. Cir.), *cert. denied,* 454 U.S. 1082 (1981); *Reuss v. Balles,* 584 F.2d 461 (D.C. Cir.), *cert. denied,* 439 U.S. 997 (1978); *Harrington v. Bush,* 553 F.2d 190 (D.C. Cir. 1977); *Metcalf v. National Petroleum Council,* 553 F.2d 176 (D.C. Cir. 1977); *Conyers v. Reagan,* 578 F. Supp. 324 (D.D.C. 1984), *appeal dismissed,* 765 F.2d 1124 (D.C. Cir. 1985); and, *Sanchez-Espinoza v. Reagan,* 568 F. Supp. 596 (D.D.C. 1983), *aff'd,* 770 F.2d 202 (D.C. Cir. 1985).

[18] App. 14a (remedial discretion doctrine).

and it would provide an inappropriate vehicle for considering the issue as it arises in the typical cases.[19]

3. Finally, petitioners' mootness question is merely a variant on their standing question. Petitioners contend that because H.R. 4042 has "by its own terms expired," the "mere publication of the bill would at this point vindicate no interest of respondents," so that the case is moot. Petition for Certiorari at 10–11.[20] Petitioners cite *Diffenderfer v. Central Baptist Church,* 404 U.S. 412 (1972), Petition for Certiorari at 12, where a potentially liable taxpayer sought an injunction against the operation of a state tax statute, and this Court held that after the statute was repealed, "[t]his relief is, of course, inappropriate now that the statute has been repealed." 404 U.S. at 415.

However, the Members and Houses assert the rights specified for them in the lawmaking process to have petitioner Burke publish H.R. 4042 as a public law, not an injunction concerning the operation of the statute. The relief sought is entirely appropriate for the interest asserted. That the petitioner has continued his refusal to publish the law for several years, even in the face of a declaratory judgment against him, does not impair respondents' interest; when petitioner respects respondents'

[19] *See INS v. Chadha,* 462 U.S. 919, 940 (1983) (describing and approving an appearance by "both Houses of Congress" in holding that "Congress is the proper party to defend the validity of a statute . . ."). For the Court to address again, only two years later, one of the very few cases, like *Chadha,* in which the Houses have intervened, will not shed light on the different and more common cases in which individual legislators appear by themsleves.

[20] Petitioners' analogy to *National Organization for Women, Inc. (NOW) v. Idaho,* 459 U.S. 809 (1982), is far-fetched. In that case, the proposed constitutional amendment failed, with or without the state ratification recissions under challenge. Here, the proposed H.R. 4042 succeeded. There is no comparison between the mere desire in *NOW v. Idaho* to record an unsuccessful effort at enactment, and the interest here in vindicating the successful lawmaking process.

interest, he publishes many laws that have expired.[21] Petitioners may dispute that the Members and Houses have standing to pursue their "plain, direct and adequate interest in maintaining the effectiveness of their votes," *Baker v. Carr*, 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)), but that is no more than a variant of their standing question.[22] The only difference is that petitioners seek, on this question, for this Court to rush into a hasty and unwise summary decision without receiving briefing or argument—a request extraordinary in the extreme, considering that the courts below received from petitioners no briefing or adversary argument prior to decision on any justiciability question.

CONCLUSION

The petition for certiorari should be denied.

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[21] *See, e.g.*, H.J. Res. 653, 656, 659, 663, 98th Cong., 2d Sess. (1984) (respectively Pub. L. Nos. 98-441, 98-453, 98-455, and 98-461 and 98 Stat. 1699, 1731, 1747, and 1814) (continuing resolutions enacted, respectively, October 3, 5, 6, and 10, each expiring almost immediately).

[22] Petitioners virtually concede that their mootness question is simply a variant on standing, repeatedly falling back, in their section on mootness, on arguments that "respondents lack standing," and that "they obviously would lack standing," Petition for Certiorari at 14, 16.

APPENDIX A: MAJOR BILLS OF THE 97th CONGRESS: POCKET VETO OR RETURN VETO

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
1	H.R. 3512	Supplemental Appropriation and Recission Act.	June 5, 1981	In session	No	P.L. 97-12.
2	H.R. 3520	Steel Industry Compliance Extension Act	July 8, 1981	In session	No	P.L. 97-23.
3	H.R. 31	Cash Discount Act	July 31, 1981	Intra adj.[1]	Pocket	P.L. 97-25.
4	S. 694	Department of Defense, Supplemental Authorization Act.	Aug. 5, 1981	Intra adj.[1]	Pocket	P.L. 97-39.
5	H.R. 4242	Economic Recovery Tax Act	Aug. 12, 1981	Intra adj.[1]	Pocket	P.L. 97-34.
6	H.R. 3982	Reconciliation Act, Omnibus	Aug. 12, 1981	Intra adj.[1]	Pocket	P.L. 97-35.
7	H.J. Res. 325	Continuing Appropriations	Oct. 1, 1981	Intra adj.[7]	Pocket	P.L. 97-51.
8	S. 304	National Tourism Policy Act	Oct. 5, 1981	In session	No	P.L. 97-63.
9	S. 1181	Uniformed Services Pay Act	Oct. 14, 1981	In session	No	P.L. 97-60.
10	S. 815	Defense Department Authorization Act	Nov. 19, 1981	In session	No	P.L. 97-86.
11	H.R. 4144	Energy and Water Development Appropriations.	Nov. 23, 1981	1 House recess	No	P.L. 97-88.
12	H.R. 3454	Intelligence Authorization Act	Nov. 23, 1981	1 House recess	No	P.L. 97-89.
13	H.R. 3413	Department of Energy National Security and Military Applications of Nuclear Energy Authorization.	Nov. 23, 1981	1 House recess	No	P.L. 97-90.
14	H.R. 4522	District of Columbia Appropriations	Nov. 23, 1981	1 House recess	No	P.L. 97-91.
15	H.J. Res. 357	Appropriations, Continuing, Further	Nov. 23, 1981	1 House recess	No	Return Vetoed.
16	S. 1098	NASA Authorization	Dec. 10, 1981	Inter adj.[2]	Pocket	P.L. 97-96.
17	H.R. 3455	Military Construction Authorization	Dec. 11, 1981	Inter adj.[2]	Pocket	P.L. 97-99.
18	H.R. 4035	Interior and Related Agencies Appropriations.	Dec. 11, 1981	Inter adj.[2]	Pocket	P.L. 97-100.
19	H.R. 4034	Housing and Urban Development—Independent Agencies Appropriations.	Dec. 11, 1981	Inter adj.[2]	Pocket	P.L. 97-101.

APPENDIX A: MAJOR BILLS OF THE 97th CONGRESS: POCKET VETO OR RETURN VETO—Continued

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
20	H.R. 4209	Transportation and Related Agencies Appropriations.	Dec. 16, 1981	Inter adj.[2]	Pocket	P.L. 97-102.
21	H.R. 4119	Agriculture, Rural Development and Related Agencies Appropriations.	Dec. 17, 1981	Inter adj.[2]	Pocket	P.L. 97-103.
22	H.R. 4241	Military Construction Appropriations	Dec. 17, 1981	Inter adj.[2]	Pocket	P.L. 97-106.
23	S. 1086	Older Americans Act Amendments	Dec. 17, 1981	Inter adj.[2]	Pocket	P.L. 97-115.
24	H.R. 4503	Water Pollution Control Act Amendments	Dec. 17, 1981	Inter adj.[2]	Pocket	P.L. 97-117.
25	H.R. 4331	Social Security Minimum Benefits	Dec. 17, 1981	Inter adj.[2]	Pocket	P.L. 97-123.
26	S. 1211	Toxic Substance Control Act Extension	Dec. 17, 1981	Inter adj.[2]	Pocket	P.L. 97-129.
27	H.R. 3567	Export Administration Amendments Act	Dec. 17, 1981	Inter adj.[2]	Pocket	P.L. 97-145.
28	S. 884	Agriculture and Food Act	Dec. 21, 1981	Inter adj.[2]	Pocket	P.L. 97-98.
29	S. 1196	International Security and Development Cooperation Act.	Dec. 22, 1981	Inter adj.[2]	Pocket	P.L. 97-113.
30	H.R. 4995	Department of Defense Appropriation Act	Dec. 22, 1981	Inter adj.[2]	Pocket	P.L. 97-114.
31	H.R. 4559	Foreign Assistance Appropriations	Dec. 22, 1981	Inter adj.[2]	Pocket	P.L. 97-121.
32	S. 1503	Petroleum Allocation Act, Standby	Mar. 9, 1982	Brief recess	No	Return Vetoed.
33	H.R. 4	Intelligence Identities Protection Act	June 15, 1982	Brief recess	No	P.L. 97-200.
34	H.R. 5922	Appropriations, Supplemental, Urgent	June 24, 1982	Intra adj.[3]	Pocket	Return Vetoed.
35	H.R. 6685	Supplemental Appropriations, Urgent	July 16, 1982	In session	No	P.L. 97-216.
36	S. 2332	Energy Emergency Preparedness Act, National.	Aug. 2, 1982	In session	No	P.L. 97-229.
37	S. 1193	International Communication Agency and Board for International Broadcasting Appropriations, Authorization.	Aug. 12, 1982	Intra adj.[4]	Pocket	P.L. 97-241.
38	H.R. 6530	Mount St. Helens National Volcanic Area, Establish.	Aug. 20, 1982	Intra adj.[4]	Pocket	P.L. 97-243.

39	H.R. 6863	Supplemental Appropriation Act	Aug. 23, 1982	Intra adj.[4]	Pocket	Return Vetoed Overridden, P.L. 97-257.
40	S. 2248	Department of Defense Authorization Act	Aug. 27, 1982	In session	No	P.L. 97-252.
41	H.R. 6955	Omnibus Budget Reconciliation Act	Aug. 27, 1982	In session	No	P.L. 97-253.
42	H.R. 4961	Miscellaneous Revenue Act	Sept. 2, 1982	In session	No	P.L. 97-248.
43	H.R. 3239	Federal Communications Commission Authorization Act.	Sept. 2, 1982	In session	No	P.L. 97-259.
44	H.R. 3663	Bus Regulatory Act	Sept. 8, 1982	In session	No	P.L. 97-261.
45	S. 923	Pre-Trial Services Act	Sept. 16, 1982	In session	No	P.L. 97-267.
46	H.R. 6068	Intelligence Authorization Act	Sept. 16, 1982	In session	No	P.L. 97-269.
47	H.R. 6956	Housing and Urban Development—Independent Agencies Appropriations.	Sept. 30, 1982	Intra adj.[5]	Pocket	P.L. 97-272.
48	S. 1409	Buffalo Bill Dam and Reservoir Enlargement in Wyoming.	Oct. 1, 1982	Intra adj.[5]	Pocket	P.L. 97-293.
49	S. 2852	Sallie Mae Technical Amendments Act	Oct. 1, 1982	Intra adj.[5]	Pocket	P.L. 97-301.
50	H.R. 6133	Endangered Species Act Amendments	Oct. 1, 1982	Intra adj.[5]	Pocket	P.L. 97-304.
51	H.J. Res. 599	Continuing Appropriations	Oct. 2, 1982	Intra adj.[5]	Pocket	P.L. 97-276.
52	H.R. 5930	Aviation Insurance Program Extension	Oct. 2, 1982	Intra adj.[5]	Pocket	P.L. 97-309.
53	H.R. 6976	Missing Children Act	Oct. 4, 1982	Intra adj.[5]	Pocket	P.L. 97-292.
54	S. 2586	Military Construction Authorization Act	Oct. 4, 1982	Intra adj.[5]	Pocket	P.L. 97-321.
55	H.R. 6968	Military Construction Appropriations	Oct. 4, 1982	Intra adj.[5]	Pocket	P.L. 97-323.
56	S. 734	Export Trade Services	Oct. 5, 1982	Intra adj.[5]	Pocket	P.L. 97-290.
57	S. 2036	Job Training Partnership Act	Oct. 5, 1982	Intra adj.[5]	Pocket	P.L. 97-300.
58	H.R. 5890	NASA Authorization Act	Oct. 5, 1982	Intra adj.[5]	Pocket	P.L. 97-324.
59	S. 2457	District of Columbia Federal Payment Increase.	Oct. 5, 1982	Intra adj.[5]	Pocket	P.L. 97-334.
60	S. 1018	Coastal Barrier Resources Act	Oct. 12, 1982	Intra adj.[5]	Pocket	P.L. 97-348.
61	H.R. 6267	Depository Institutions Amendments	Oct. 13, 1982	Intra adj.[5]	Pocket	P.L. 97-320.
62	H.R. 4717	Taxes, LIFO Recapture Effective Date	Oct. 13, 1982	Intra adj.[5]	Pocket	P.L. 97-362.
63	H.R. 4441	Copyright Office in the Library of Congress, Fees Submitted to, With Respect To.	Oct. 13, 1982	Intra adj.[5]	Pocket	P.L. 97-366

APPENDIX A: MAJOR BILLS OF THE 97th CONGRESS: POCKET VETO OR RETURN VETO—Continued

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
64	H.R. 7019	Transportation and Related Agencies Appropriations.	Dec. 17, 1982	Final adj.[6]	Pocket	P.L. 97-369.
65	H.R. 7072	Agriculture, Rural Development and Related Agencies Appropriations.	Dec. 17, 1982	Final adj.[6]	Pocket	P.L. 97-370.
66	H.J. Res. 631	Continuing Appropriations, Further	Dec. 20, 1982	Final adj.[4]	Pocket	P.L. 97-377.
67	H.R. 7144	District of Columbia Appropriations	Dec. 21, 1982	Final adj.[6]	Pocket	P.L. 97-378.
68	H.R. 6946	False Identification Crime Control Act	Dec. 21, 1982	Final adj.[6]	Pocket	P.L. 97-398.
69	S. 2623	Indians, Tribally Controlled Community College Act Extension.	Dec. 22, 1982	Final adj.[6]	Pocket	Pocket Vetoed.
70	H.R. 7356	Interior and Related Agencies Appropriations.	Dec. 23, 1982	Final adj.[6]	Pocket	P.L. 97-394.
71	H.R. 5238	Orphan Drug Act	Dec. 23, 1982	Final adj.[6]	Pocket	P.L. 97-414.
72	H.R. 2330	Nuclear Regulatory Commission Authorization.	Dec. 23, 1982	Final adj.[6]	Pocket	P.L. 97-415.
73	H.R. 6211	Surface Transportation Assistance Act	Jan. 3, 1983	Final adj.[6]	Pocket	P.L. 97-424.
74	H.R. 5447	Futures Trading Act	Jan. 3, 1983	Final adj.[6]	Pocket	P.L. 97-444.
75	H.R. 4566	Tariff Schedules Amendments	Jan. 3, 1983	Final adj.[6]	Pocket	P.L. 97-446.
76	H.R. 6056	Technical Corrections Act	Jan. 3, 1983	Final adj.[6]	Pocket	P.L. 97-448.
77	H.R. 5002	Fishery Conservation and Management Improvement.	Jan. 3, 1983	Final adj.[6]	Pocket	P.L. 97-453.
78	H.R. 7093	Virgin Islands Taxes Revision	Jan. 3, 1983	Final adj.[6]	Pocket	P.L. 97-455.
79	H.R. 6094	U.S. International Trade Commission, U.S. Customs Service, U.S. Trade Representative Authorization.	Jan. 3, 1983	Final adj.[6]	Pocket	P.L. 97-456.
80	H.R. 3420	Pipeline Safety Authorization Act	Jan. 3, 1983	Final adj.[6]	Pocket	P.L. 97-468.
81	H.R. 5470	Periodic Payment Settlement Act	Jan. 3, 1983	Final adj.[6]	Pocket	P.L. 97-473.
82	H.R. 3963	Contract Services for Drug Dependent Federal Offenders Act Amendments.	Jan. 3, 1983	Final adj.[6]	Pocket	Pocket Vetoed.

This chart analyzes the bills listed in the 97th Congress's final House Calendar section on Bills Through Conference. In the column, "Status of Congress Ten Days After Presentation," "in session" means the originating House of the bill was in session ten days after presentation (Sundays excluded), regardless of the status of the nonoriginating House; "one house recess" means the originating House war in recess while the nonoriginating House was in session; "brief recess" means both Houses were in recess for three days or less, so that no adjournment resolution was necessary; "intra adj." means an intrasession adjournment; "inter adj." means the intersession adjournment; "final adj." means the final adjournment.

In the column, "Subject to Pocket Veto," "pocket" means that ten days after presentation Congress was in an intrasession, intersession, or final adjournment. Several bills labeled "pocket" were return vetoed, either because the President return vetoed them before the end of ten days, or because the President returned them despite Congress being in adjournment.

The dates of adjournment, stated below in the footnotes, were from *1983–84 Congressional Directory* at 423, 425. The House and Senate status when not governed by adjournment resolution (in session, 1 House recess, or brief recess) is from House and Senate Calendars.

[1] S. Con. Res. 27 provided for adjournment of the House Aug. 4 to Sept. 9, 1981, and of the Senate Aug. 3 to Sept. 9, 1981.

[2] S. Con. Res. 57 provided for *sine die* adjournment of the Congress Dec. 16, 1981.

[3] H. Con. Res. 367 provided for adjournment of the House any day between June 28 and July 2, 1982 to July 12, 1982, and of the Senate July 1 or July 2, 1982 to July 12, 1982. Pursuant to it, the House was in recess July 1 to July 12, 1982, and the Senate was in recess July 1 to July 12, 1982.

[4] H. Con. Res. 399 provided for adjournment of the House Aug. 20 to Sept. 8, 1982, and of the Senate Aug. 19, Aug. 20, or Aug. 21 to Sept. 8, 1982. Pursuant to it, the Senate was in recess Aug. 20 to Sept. 8, 1982.

[5] H. Con. Res. 421 provided for adjournment of Congress Oct. 1 or Oct. 2, 1982 to Nov. 29, 1982. Pursuant to it, Congress was in recess Oct. 1 to Nov. 29, 1982.

[6] H. Con. Res. 438 provided for *sine die* adjournment of the House Dec. 20 or Dec. 21, 1982, and of the Senate anytime before Jan. 3, 1983. Pursuant to it, Congress adjourned Dec. 23, 1982.

[7] H. Con. Res. 201 provided for adjournment of the House Oct. 7 to Oct. 13, 1981, and of the Senate Oct. 7 to Oct. 14, 1981.